BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SANDRA M. MILLER	)	
Claimant	)	
	)	
VS.	)	
	)	
WALMART	)	
Respondent	)	Docket No. 1,050,117
	)	
AND	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the December 7, 2011, Award entered by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on March 6, 2012. The Director appointed E. L. Lee Kinch to serve as Appeals Board Member Pro Tem in place of recused Board Member Gary R. Terrill. James E. Martin, of Overland Park, Kansas, appeared for claimant. Ryan D. Weltz, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that the evidence did not show that claimant's right hip condition was caused by her work accident of November 25, 2008. However, the ALJ found claimant was permanently, totally disabled as a result of the work-related injury to her left upper extremity. The ALJ also found that any temporary total or permanent total benefits due to claimant after March 26, 2009, shall be reduced by $206.47 per week, the amount the claimant receives in Social Security retirement benefits.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant asks the Board to affirm the ALJ's finding that she is permanently, totally disabled but to modify the Award to also find that she suffered injuries to her right hip and

lower back in the work-related accident of November 25, 2008. Claimant further contends the ALJ erred in reducing claimant's award for benefits due to the Social Security offset.

Respondent asks the Board to affirm the finding of the ALJ that claimant's right hip and lower back complaints were not related to her work-related accident and, therefore, claimant only suffered a scheduled injury to her left upper extremity. Respondent, however, argues that claimant is not eligible for permanent total disability because she had a single scheduled injury. Respondent also argues that claimant is not permanently, totally disabled because she still has the capacity to work. In the event the Board finds that claimant suffered an injury to the body as a whole, respondent argues she is not eligible for work disability because her task loss is not a result of her workplace injury but instead is due to a preexisting injury. Respondent asserts that claimant's benefits must be offset by her Social Security retirement benefits. It also contends it is entitled to a credit for temporary total disability benefits paid after the date claimant began receiving Social Security retirement benefits because they are duplicative of claimant's Social Security retirement benefits. During oral argument to the Board, respondent stated it would abandon its claim for a social security retirement offset against both the permanent partial disability and the temporary total disability compensation if claimant's award is limited to her percentage of functional impairment.

The issues for the Board's review are:

(1) What is the nature and extent of claimant's disability? Did claimant prove she sustained her work-related injury to her right hip and/or lower back in addition to her left shoulder?

(2) Are claimant's temporary total disability and/or permanent partial disability benefits to be offset by her Social Security retirement benefits?

(3) Is respondent entitled to a credit for temporary total disability benefits paid after the date claimant began receiving Social Security retirement benefits because they are duplicative of claimant's Social Security retirement benefits?

FINDINGS OF FACT

Claimant was employed by respondent as the manager of the stationery department. She began working for respondent on March 28, 1996. At the time of her accident, claimant was 64 years old. As a manager, claimant's job included unloading pallets of product, making price changes, dealing with freight in the back room, and unloading pallets from trucks. At times she would climb ladders to get to the merchandise and lift boxes of stationery that weighed from 40 to 50 pounds. The job required her to lift, carry, push and pull.

On November 25, 2008, claimant was going through a door to the dock area when she stubbed her toe on an empty pallet and was thrown over the pallet. She wrapped her

left shoulder around the metal dock doors, hit the side of her face, and broke her glasses. She bounced across to a conveyor belt and hit her hand, cutting it. When she fell, she landed on her right hip. She fell on cement, gravel, and rocks. Claimant testified she felt excruciating pain in her left shoulder.

Claimant was taken by ambulance to the hospital, where x-rays were taken of her left shoulder. The x-rays confirmed she had suffered a 4-part fracture of her left shoulder. Claimant was treated by Dr. Lanny Harris, who performed six surgical procedures on claimant's left shoulder. As a result of the injury and surgeries, claimant can only move her arm a couple of inches away from her body. She cannot lift her arm at all. She cannot move her left shoulder, and her left arm is turning black.

On November 26, 2008, claimant filled out an accident report for respondent in which she indicated she suffered injuries to her left shoulder, right knee, left eye, and right thumb. There is no mention on the form that claimant had injured her right hip or low back. Claimant testified she did not notice her right hip pain at first. She said she laid in bed for months after the accident due to the pain and treatment for her left shoulder. Once she was taken off pain medication, she noticed the pain in her right hip. Claimant said after she began feeling the hip pain, she told Dr. Harris about the pain during several office visits, and one time, he gave her a prescription for Motrin. Claimant testified she saw Dr. Adrian Jackson for complaints about her hip. She said Dr. Jackson sent her to Dr. Galate, who gave her an injection in her right hip. Claimant was seen by Dr. Thomas Samuelson in February 2011.[1] Claimant testified that since she started noticing the pain in her hip, her condition has gotten worse and now she cannot stand long enough to do the dishes or sweep the floor.

Claimant acknowledged that she suffers from rheumatoid arthritis but said it mostly affected her hands and did not affect her hip. Claimant also had previously undergone surgery on her low back in 2007, as well as a knee replacement in 1998. She had foot surgery several years before the accident for neuromas that were caused from working on her feet for years on cement floors.

Claimant returned to work after the accident sometime in March 2009.[2] She did not return to her job as manager of the stationery department but was put to work answering the telephone. Claimant testified she started receiving Social Security retirement benefits on March 26, 2009. She was still performing light duty work for respondent at that time. She continued to work for respondent but was off work from July to September 2009 and again from December 2009 until July 2010. When she returned in July 2010, she was placed back answering the telephone but was then told that job was no longer open and

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[1] It is unclear from the record whether the treatments of Drs. Jackson, Galate or Samuelson were authorized. None of them testified and none of their records were made a part of the record in this case.

[2] The post-accident wage records stipulated into the record show her first paycheck after the accident was dated March 13, 2009.

she would have to work the front of the store as a greeter. Claimant testified she told respondent she could not do that job because she would not be able to pull the carts apart and because she could not stand for long periods of time. Because she believed she could not perform the job of a greeter, she terminated her position with respondent. She has not worked anywhere since she quit and has no income other than her Social Security retirement benefits.

Dr. Edward Prostic is a board certified orthopedic surgeon who examined claimant on May 23, 2011, at the request of her attorney.[3] Claimant told Dr. Prostic she had been walking into a storage area when she stubbed her toe and fell across some pallets, injuring her left shoulder and right hip. She was seen at the emergency room where x-rays were taken and she was given a shoulder immobilizer. She was referred to Dr. Lanny Harris. She had surgery on December 9, 2008, for a hemiarthroplasty of the shoulder for a 4-part fracture. Claimant had difficulties post-operatively and had surgery on July 15, 2009, for excision of a fracture fragment and repair of the rotator cuff. She had surgery again on November 25, 2009, for repeat repair of the rotator cuff. She developed an infection and on December 29, 2009, underwent debridement and open packing. She had debridement of the sinus tract in her shoulder on February 24, 2010. Her last surgery was on March 10, 2010, for removal of the humeral prosthesis and further debridement. A PICC line was inserted and antibiotics were provided.

Relative to claimant's left shoulder, she complained of very limited motion of the shoulder and reported the arm was turning dark. In examining claimant, Dr. Prostic noted her left shoulder alignment was satisfactory. She had no atrophy of the upper arm. She had diffuse tenderness about the shoulder. Dr. Prostic said claimant is missing her humeral head. Therefore, she has no pivot point in the shoulder. In addition, claimant has significant loss of passive motion, indicating she has severe scarring about the shoulder itself. No neurologic deficit was obvious.

Dr. Prostic acknowledged that the treatment claimant received initially predominantly pertained to her left shoulder. It was only later on that claimant was seen by Drs. Jackson and Galate for her hip complaints.

Claimant told Dr. Prostic her current area of greatest symptoms was her right hip. She told him she had difficulty lying on either side and difficulty with more than short term standing or walking. She had intermittent numbness and tingling of the anterolateral right thigh, particularly with standing. In examining claimant's right hip, Dr. Prostic said the alignment was satisfactory. She had no tenderness. Dr. Prostic said claimant had reasonably good motion of the hip but pain at the extremes, which is a sign that her pain originated at the hip. No other abnormality was obvious. X-rays of claimant's right hip showed no focal abnormality. The hip x-ray did not show any evidence of rheumatoid arthritis as being the source of her hip pain

[3] Dr. Prostic's written report was not made an exhibit to his deposition.

Dr. Prostic diagnosed claimant as being postoperative comminuted fracture of the proximal humerus with poor result and injury to the hip which had been diagnosed as trochanteric bursitis. Dr. Prostic also noted that claimant had symptoms consistent with meralgia paresthetica. Dr. Prostic said trochanteric bursitis can come on for insidious reasons. Dr. Prostic acknowledged that trochanteric bursitis might show up after a lumbar surgery of the type claimant had in 2007. Trochanteric bursitis is very common in people with chronic low back pain. Dr. Prostic also indicated that claimant's hip difficulties may be contributed to by rheumatoid arthritis.

Dr. Prostic said that although claimant has a good left hand, she has poor use of her left upper extremity and poor ability to position the hand in space to do useful work. She does not have strength to do significant pushing, pulling, reaching or lifting left-handed. Because of her hip condition, claimant should not be doing prolonged standing or walking. He opined these conditions were caused by claimant's work related accident of November 25, 2008. Dr. Prostic did not believe that claimant would be able to return to any substantial and gainful employment.

Dr. Prostic reviewed a task list prepared by Mike Dreiling. Of the 18 tasks on the list, he opined claimant was unable to perform 14 for a 78 percent task loss. Dr. Prostic reviewed Steve Benjamin's task list. Of the 28 tasks on his list, he believed claimant was unable to perform 13 for a 46 percent task loss.

Based on the AMA *Guides*,[4] Dr. Prostic rated claimant as having a 60 percent permanent partial impairment of the left upper extremity and a 10 percent permanent partial impairment to the whole body for her low back and right hip complaints. These would combine for a total impairment of 42 percent to the body as a whole. Dr. Prostic did not add anything into claimant's impairment for preexisting conditions when he rated her hip/low back at 10 percent.

Dr. Prostic believed claimant would benefit from future medical treatment. For her shoulder, he would recommend a reverse total shoulder arthroplasty. At her hip, Dr. Prostic opined claimant would benefit from periodic steroid injections, stretching exercises, and ultimately she may require either a total hip replacement arthroplasty and/or arthrodesis at L4-5.

Dr. David Clymer, a board certified orthopedic surgeon, evaluated claimant on May 23, 2011, at the request of respondent. Claimant told Dr. Clymer that on November 25, 2008, she fell, striking hard on the left shoulder and left side of her face. She also recalled some injury to her right hip and low back. She told him her primary focus was on the severe pain of her left shoulder. She was found to have a severely comminuted 4-part fracture involving the left proximal humerus. She was evaluated by Dr. Lanny Harris and

[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

underwent a series of surgical treatments involving the left shoulder. Apart from her problems in regard to her shoulder, claimant complained of discomfort in the area of her right low back, hip and thigh, for which she was evaluated by Dr. Adrian Jackson on July 28, 2010. Claimant was seen by Dr. Joseph Galate on October 20, 2010. Dr. Clymer also reviewed the report of Dr. Samuelson, who saw claimant in February 2011. Dr. Clymer reviewed the MRI study of December 1, 2010, and stated it revealed her 2007 surgical decompression at L4-5 and moderate degenerative spondylosis and well as Grade I spondylolisthesis. There was no evidence of any new injuries. He also reviewed x-rays of claimant's left shoulder which revealed complete loss of the proximal humerus. X-rays of the right hip were essentially within normal limits with only minor degenerative changes at the hip joint.

Claimant told Dr. Clymer her primary complaints were of stiffness, pain and weakness involving the left shoulder. She complained also of discomfort over the lateral aspect of the right hip. She walked with a normal gait pattern. Upon examination, Dr. Clymer stated claimant had atrophy at the deltoid musculature. There was no evidence of any active infection. The shoulder was uncomfortable to movement and palpation. Range of motion was somewhat self-limited by subjective discomfort and by weakness. Claimant had mild generalized crepitus consistent with her resection arthroplasty. Claimant had generalized discomfort to palpation in the paraspinal musculature extending toward the right S1 joint and out onto the right buttock and lateral thigh. Range of motion of the low back was somewhat limited in flexion and rotation toward the right side due to the low back discomfort. Claimant had discomfort to palpation over the right hip at the greater trochanter most consistent with mild chronic trochanteric bursitis. The hip joint demonstrated good range of motion and stability.

Dr. Clymer stated that claimant sustained a rather severe left proximal humerus fracture as a result of her fall at work. Dr. Clymer stated claimant had a failed repair of the fracture, which ultimately required removal of all the hardware, leaving her with an unstable resection hemiarthroplasty of the shoulder. She is limited in her ability to use the left arm and has very limited strength and range of motion.

Based on the AMA *Guides*, Dr. Clymer rated claimant as having a 50 percent permanent partial impairment of the left upper extremity. Dr. Clymer recommended that claimant perform very light limited activities with the left arm and hand if performed below shoulder height and with a weight limit of 5 pounds.

Dr. Clymer did not find she had evidence of a new injury involving the low back. In regard to claimant's right hip, he stated she has symptoms consistent with mild trochanteric bursitis. He does not believe claimant had any permanent partial impairment for this condition as a result of the November 25, 2008, work accident.

> Q. [by respondent's attorney] Do you have an opinion as to whether that right greater trochanteric bursitis is caused by or related to the November 25, 2008, accident?

> A. [by Dr. Clymer] I think I would be only speculating. I don't have enough information to feel that I could relate those to a reasonable degree of medical certainty.[5]

Further, he did not feel any work restrictions were necessary with regard to the right hip or low back. Dr. Clymer reviewed a task list prepared by Steve Benjamin. Of the 28 tasks on the list, he opined that claimant was unable to perform 6 for a 21 percent task loss.

As far as future medical in regard to claimant's hip, Dr. Clymer recommended a general fitness and exercise program and occasional use of anti-inflammatories. He had no future medical treatment recommendations relative to claimant's left shoulder. He stated claimant might benefit from a total shoulder replacement. But with her previous infection and multiple surgeries, claimant would be at a great risk of recurring infection or worse.

Michael J. Dreiling, a vocational rehabilitation consultant, met with claimant on June 8, 2011, at the request of claimant's attorney. Claimant had to be driven to the appointment because she said it was difficult for her to drive that distance. Mr. Dreiling prepared a list of 18 tasks that claimant performed in the labor market in the 15-year period prior to her injury.

Claimant told Mr. Dreiling she had graduated high school in 1962 and in 1984 she completed dental assistant training. She never became certified as a dental assistant but she was registered. She worked as a dental assistant for several years. She denied having typing or computer skills. Mr. Dreiling opined that the lack of any further formal academic or vocational training is limiting for claimant, especially taking into account her medical restrictions. At the time of the session, claimant was retired and was receiving Social Security retirement benefits.

Mr. Dreiling concluded, based on claimant's medical restrictions, she is not a candidate to return to any kind of work. Neither is she a candidate for vocational rehabilitation or job placement. Mr. Dreiling stated that claimant's medical restrictions are quite limiting especially for someone of her age, education, training, and type of work she has done in the past. Mr. Dreiling felt claimant was essentially and realistically unemployable in the open labor market.

Steve Benjamin is a vocational rehabilitation consultant. He conducted a vocational evaluation of claimant at the request of respondent. The interview was held by telephone. He compiled a list of 28 tasks that claimant performed in the 15-year period before her work-related injury. At the time he spoke with claimant, she had a 100 percent wage loss.

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[5] Clymer Depo. at 14.

Mr. Benjamin noted that in reference to the restrictions of Drs. Samuelson, Harris and Clymer, claimant would be able to re-enter the open labor market doing light, sedentary type work and entry level or non-skilled type work. Claimant would be able to perform the work of an office cashier, order clerk, receptionist and telephone solicitor. Mr. Benjamin agreed that if claimant was unable to use her left arm whatsoever, she would be unable to work. In reference to the opinions and restrictions of Dr. Prostic, claimant would not be able to re-enter the job market.

Mr. Benjamin acknowledged that claimant had never worked as a receptionist, telephone solicitor, order clerk, or office cashier. In general, one would have to use bilateral hands for those positions. He interviewed her by phone, so he could not see her ability to move or not move her left upper extremity.

Mr. Benjamin said depending on the store, a job at respondent as a greeter would be a light duty job. He did not know what positions respondent had offered claimant or if claimant could perform the job offered. But he generally believed it is easier for a person to keep his or her employment and move to a different job than to leave the employer and find a new job.

Mr. Benjamin did not perform a labor market survey. Claimant lived in Pomona, Kansas, and had worked in Ottawa, Kansas. Ottawa would be the only community with a population over 2,000 within 15 miles of claimant's home. Mr. Benjamin said his opinions about claimant's ability to return to work would assume she is able to get a job in the community in which she resides and is able to get transportation to and from work.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510d (Furse 2000) states in part:

> (a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as

provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .

(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

. . . .

(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

(b) Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except the benefits provided in K.S.A. 44-510h and 44-510i and amendments thereto, and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability, except that the director, in proper cases, may allow additional compensation during the actual healing period, following amputation. The healing period shall not be more than 10% of the total period allowed for the scheduled injury in question nor in any event for longer than 15 weeks. The return of the employee to the employee's usual occupation shall terminate the healing period.

K.S.A. 44-510e(a) (Furse 2000) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 44-510c(a)(2) (Furse 2000) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

K.S.A. 44-510f(a) (Furse 2000) states:

> Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:
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> (1) For permanent total disability, including temporary total, temporary partial, permanent partial and temporary partial disability payments paid or due, $125,000 for an injury or any aggravation thereof;
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> (2) for temporary total disability, including any prior permanent total permanent partial or temporary partial disability payments paid or due, $100,000 for an injury or any aggravation thereof;
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> (3) subject to the provisions of subsection (a)(4), for permanent or temporary partial disability, including any prior temporary total, permanent total, temporary partial, or permanent partial disability payments paid or due, $100,000 for an injury or any aggravation thereof; and
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> (4) for permanent partial disability, where functional impairment only is awarded, $50,000 for an injury or aggravation thereof.

K.S.A. 2008 Supp. 44-501(h) states:

> If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

In *Robinson*,[6] the Kansas Court of Appeals held:

> Under the facts of this case, the application of a retirement benefits offset at the commencement of the claimant's permanent partial disability payments did not lower the claimant's award below his percentage of functional impairment in violation of K.S.A. 44-501(h) where the claimant would still receive benefits totaling in excess of the amount the functional impairment award would have been without the offset.

ANALYSIS

When claimant tripped and fell at work on November 25, 2008, she struck her left shoulder and then landed on her right hip. At the time, her most painful symptoms were in her left shoulder area, and this was the area of focus during the initial medical treatment. X-rays showed a 4-part fracture of her left shoulder, and claimant ultimately underwent six surgical procedures for that injury. She is left with limited use of her left arm. It was not until after she was ambulatory and off her pain medications that claimant really noticed the problem in her low back and right hip. She reported these symptoms to Dr. Harris, and he gave her a prescription for Motrin. She also saw Drs. Jackson, Galate and Samuelson for the back and hip condition. Dr. Galate gave her an injection in her right hip. It is unknown what treatment Drs. Jackson and Samuelson may have provided. Although claimant suffers from a non-work-related rheumatoid arthritis condition, that condition primarily affects her hands, not her back or hip. Dr. Prostic diagnosed trochanteric bursitis and meralgia parasthetica. And although Dr. Prostic acknowledged that claimant's hip symptoms could be contributed to by rheumatoid arthritis, the x-rays of claimant's right hip did not show evidence of rheumatoid arthritis being the source of her hip pain.

The Board finds that claimant's low back and hip conditions are a result of her work-related accident. Claimant has a 10 percent permanent impairment of function to the body as a whole for her hip and low back condition in addition to a 60 percent permanent impairment of function to her left upper extremity at the level of the shoulder for a combined functional impairment of 42 percent to the body as a whole. Claimant is entitled to future medical treatment upon application for all body parts affected by the accident. The Board disagrees with the ALJ that K.S.A. 2011 Supp. 44-510h should be applied retroactively to this claim. The Board otherwise adopts and affirms the findings and conclusions of the ALJ set forth in the Award. The Board will, however, recompute the permanent total disability award to provide that the social security offset cannot reduce claimant's benefits to less than the value of her 42 percent impairment of function, which

[6] *Robinson v. Southwestern Bell Telephone Co.*, 39 Kan. App. 2d 342, Syl. ¶ 7, 180 P.3d 597, *rev. denied* 286 Kan. 1179 (2008).

amounts to $75,070.59,[7] which is inclusive of the temporary total disability compensation without a reduction for the social security offset, and in addition, to provide that respondent's credit for overpayment of temporary total disability compensation be applied at the end of the payment schedule rather than at the beginning. Furthermore, during the period of time claimant was working post accident, her permanent disability award is limited to her percentage for permanent impairment of function. Permanent total compensation will commence July 22, 2010, after claimant stopped performing the accommodated work under her light duty restrictions.

CONCLUSION

(1) Claimant is permanently and totally disabled as a result of her work-related injuries.

(2)(3) The weekly amount of temporary total, permanent partial and permanent total disability compensation shall be reduced by the weekly amount of claimant's social security retirement benefits, but in no way shall the total award be less than the value of claimant's 42 percent whole body impairment of function.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated December 7, 2011, is modified to find claimant's combined permanent impairment of function is 42 percent to the body as a whole, to adjust the calculation of the awarded benefits, and to clarify that the order for future medical benefits upon application includes the back and hip in addition to the shoulder, but the Award is otherwise affirmed.

Claimant is entitled to 14.14 weeks of temporary total disability compensation at the rate of $317.10 in the amount of $4,483.79 followed by 36.72 weeks temporary total disability compensation at the rate of $110.73 in the amount of $4,066.01, for a total amount of temporary total disability compensation of $8,549.80, which has already been paid with an overage of $7,581.58.

As of April 12, 2012, claimant is entitled to 3 weeks of permanent partial disability at the rate of $317.10 per week for an amount of $951.13, followed by 32.29 weeks of permanent partial disability at the rate of $110.73 per week in the amount of $3,575.47, followed by 90 weeks of permanent total disability at the rate of $178.78 per week in the amount of $16,092, for a total amount of permanent total disability due and owing of $20,618.60.

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[7] This sum does not violate the permanent partial disability compensation maximum in K.S.A. 44-510f(a)(4) (Furse 2000) because of the $75,070.59 total, only $47,755.59 is permanent partial disability. The rest is temporary total disability compensation.

The remaining amount of permanent total disability due shall be paid at the rate of $178.78 per week for 536.03 weeks, minus 42.41 weeks or $7,581.58 for the overpayment of temporary total disability compensation.

IT IS SO ORDERED.

Dated this _____ day of April, 2012.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Ryan D. Weltz, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge